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No. 87-403

In the Supreme Court of the United States

OCTOBER TERM, 1987

FEDERAL PACIFIC ELECTRIC COMPANY, INC.,
PETITIONER,

v.

PATRICIA DIGHTON, GEORGE P. DIGHTON, PPA, CHRISTOPHER DIGHTON, PPA, LESLIE ABBOTT, ADMINISTRATRIX OF THE ESTATE OF JAMES ABBOTT, RICHARD STAFFORD, ADMINISTRATOR OF THE ESTATE OF CASANDRA CHIMINELLO, GENERAL ELECTRIC COMPANY, KAISER ALUMINUM AND CHEMICAL CORP., LEVITON MANUFACTURING CO., INC., SERT, JACKSON & ASSOCIATES, INC., GEORGIA PACIFIC CORP. AND ARVIN INDUSTRIES, INC.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

BRIEF OF RESPONDENT SERT, JACKSON & ASSOCIATES, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I

QUESTION PRESENTED

Does M.G.L. c. 260, §2B, a statute of repose for claims against architects and design professionals, satisfy the requirements of the equal protection clause of the United States Constitution?

RULE 28.1 STATEMENT

Respondent Sert, Jackson and Associates, Inc. has no parent corporations, subsidiaries, or affiliates to list pursuant to Rule 28.1.

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BRIEF OF RESPONDENT SERT, JACKSON & ASSOCIATES, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The respondent Sert, Jackson and Associates, Inc., respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Massachusetts Supreme Judicial Court's opinion in this case.

Opinion Below

The opinion of the Massachusetts Supreme Judicial Court in this case is reported at 399 Mass. 687, 506 N.E.2d 509 (1987) and is reproduced in the appendix attached to the petition for writ of certiorari at pp. 23a to 35a.

Statute Involved

Massachusetts General Laws c. 260, §2B, inserted by St. 1968, c. 612 and amended by St. 1973, c. 777, §2, provides as follows:[1]

> Actions of tort for damages arising out of any deficiency or neglect in the design, planning, construction or general administration of an improvement to real property shall be commenced only within three years next after the cause of action accrues; provided, however, that in no event shall such actions be commenced more than six years after the performance or furnishing of such design, planning, construction or general administration.

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[1] Subsequent to a 1984 amendment, M.G.L. c. 260, §2B provides as follows:

> Action of tort for damages arising out of any deficiency or neglect in the design, planning, construction or general administration of an improvement to real property, other than that of a public agency as defined in section thirty-nine A of chapter seven shall be commenced only within three years next after the cause of action accrues; provided, however, that in no event shall such actions be commenced more than six years after the earlier of the dates of: (1) the opening of the improvement to use; or (2) substantial completion of the improvement and the taking of possession for occupancy by the owner.
>
> Actions of tort for damages arising out of any deficiency or neglect in the design, planning, construction, or general administration of an improvement to real property of a public agency, as defined in said section thirty-nine A shall be commenced only within three years next after the cause of action accrues; provided, however, that in no event shall actions be commenced more than six years after the earlier of the dates of: (1) official acceptance of the project by the public agency; (2) the opening of the real property to public use; (3) the acceptance by the

Counterstatement of the Case

The Respondent, Sert, Jackson and Associates, Inc. ("Sert Jackson"), submits the following Counterstatement to add relevant facts omitted from the petitioner's Statement and to correct certain inaccuracies.

In its Statement of the Case, the petitioner, Federal Pacific Electric Company ("Federal Pacific"), correctly states that this case arose out of three consolidated actions in Suffolk Superior Court (Civil Action Nos. 58322, 65216, and 65217). In Civil Action Nos. 65216 and 65217, Federal Pacific was the named defendant, and it impleaded, *inter alia*, Sert Jackson as a third party defendant.

In the third related action, Patricia Dighton ("Ms. Dighton"), a plaintiff in one of the two actions against Federal Pacific, commenced an action against her landlord, the general contractor which built her apartment building, the contractor's surety, and Sert Jackson as architect (Suffolk Superior Court Civil Action No. 58322). Sert Jackson was never served in this action, and all defendants, except Sert Jackson, settled this action.

In conjunction with its motion to dismiss the third-party complaints against it in Suffolk Superior Court Civil Action Nos. 65216 and 65217, Sert Jackson also filed a motion to dismiss in C.A. No. 58322, alleging several grounds. Suffolk Superior Court allowed the motion to dismiss in C.A. No. 58322 on the grounds that the claim was barred by M.G.L. c. 260, §2B, and Ms. Dighton did not appeal from the dismissal of this action.

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contractor of a final estimate prepared by the public agency pursuant to chapter thirty, section thirty-nine G; or (4) substantial completion of the work and the taking possession for occupancy by the awarding authority.

The parties and the trial court relied on the post-1984 statute, while the Supreme Judicial Court appears to have utilized the pre-1984 statute. 399 Mass. at 688 n.4, 437 N.E.2d at 511 n.4. However, the Massachusetts Supreme Judicial Court also found that the differences between the two statutes were immaterial for the purposes of this case. *Id.*

The basis of the third-party complaint by Federal Pacific against Sert Jackson was that as an architect for the premises at issue, Sert Jackson had designed the premises and its structural and electrical components and that Sert Jackson's alleged negligence and breach of express or implied warranties in such design and construction proximately caused the plaintiffs' injuries. The record at the time of the allowance of Sert Jackson's motion to dismiss, and consequently the record on appeal, contained neither the allegation nor proof that Sert Jackson approved the use of aluminum rather than copper wire or that the failure to use copper wire or, in the alternative, that the use of aluminum wire, caused the fire.

Reasons Why the Petition Should Be Denied

I. The Massachusetts Supreme Judicial Court Correctly Held That M.G.L. c. 260, §2B Does Not Violate the Equal Protection Clause of the United States Constitution.

In its petition for a writ of certiorari, Federal Pacific argues that M.G.L. c. 260, §2B violates the equal protection clause of the United States Constitution because the statute improperly distinguishes between architects and materialmen or suppliers, even though the two groups are allegedly similarly situated, and that any distinction between the two groups is arbitrary and without a rational basis. However, the Massachusetts Supreme Judicial Court found that architects and suppliers are not similarly situated and that providing the protection of the statute to those involved in design and construction, but not to suppliers or materialmen, bears a rational relationship to a legitimate and permissible legislative objective. Consequently, the Massachusetts Supreme Judicial Court properly held that M.G.L. c. 260, §2B is constitutional, and there is no need for this Court to review that decision.

Equal protection analysis requires strict scrutiny of a legislative classification only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class. *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307, 312 (1976). Where a challenged provision neither adversely affects a fundamental right nor contains a classification based upon a suspect criterion, the provision is examined under the "rational basis" test, whereby the statute will be sustained if the legislature could have reasonably concluded that the challenged classification would promote a legitimate state purpose. *Exxon Corp.* v. *Eagerton*, 462 U.S. 176, 195-196 (1983).[2]

In determining whether a challenged classification is rationally related to the achievement of a legitimate state purpose, this Court will examine two questions: (1) whether the challenged legislation has a legitimate purpose, and (2) whether it was reasonable for the lawmaker to believe that use of the challenged classification would promote that purpose. *Western and Southern Life Ins. Co.* v. *State Board of Equalization*, 451 U.S. 648, 668 (1981). Legislatures are ordinarily presumed to have acted constitutionally, and state laws are entitled to a presumption of validity against attack under the equal protection clause. *Clements* v. *Fashing*, 457 U.S. 957, 962-963 (1982) and *Parham* v. *Hughes*, 441 U.S. 347, 351 (1979). Furthermore, the classification will be upheld if the question as to whether the legislation furthers a legitimate state goal is at least debatable. *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981).

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[2] On occasion, this Court has employed an intermediate standard to examine certain types of classifications, such as those based on gender or illegitimacy. *See, e.g., Craig* v. *Boren*, 429 U.S. 190 (1976) and *Mills* v. *Habluetzel*, 456 U.S. 91 (1982). Under this intermediate standard, the challenged classification must be substantially related to a legitimate state interest. *Mills* v. *Habluetzel*, 456 U.S. at 99.

A legislature may draw classifications "one step at a time", addressing problems in a piecemeal fashion, and a classification is not deficient simply because the state could have selected another means of achieving the desired end. *Clements* v. *Fashing*, *supra* at 969-970. Moreover, a court examining a classification under the equal protection clause should not substitute its judgment of good public policy for that of the legislature. *Schweiker* v. *Wilson*, 450 U.S. 221, 234 (1981) and *Parham* v. *Hughes*, *supra* at 351.

The U.S. Supreme Court has utilized the rational basis test to examine the constitutionality of statutes regulating the duration of a defendant's liability. For example, in *G. D. Searle & Co.* v. *Cohn*, 455 U.S. 404 (1982), the U.S. Supreme Court examined a New Jersey statute which tolled the statute of limitations as against out-of-state corporations and, utilizing the rational basis test, found the statute constitutional.

In *G. D. Searle & Co.*, a New Jersey statute tolled the running of the statute of limitations against out-of-state corporations if the corporation had no resident agent on whom to make service. The trial court had found that the tolling provision operated to preserve only causes of action against corporate defendants that were not subject to *in personam* jurisdiction in New Jersey, and with the enactment of New Jersey's long arm rule, the rationale for the pre-existing tolling provision ceased to exist. Consequently, the trial court held that the tolling provision served no logical purpose and found it invalid under the equal protection clause.

The U.S. Supreme Court disagreed. Utilizing the rational basis test and relying on reasons supporting the statute articulated in a New Jersey case, the Court found that the statute satisfied this test because rational reasons supported tolling the limitation period for unrepresented foreign corporations despite the institution of long-arm jurisdiction in New Jersey.[3]

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[3] Unrepresented foreign corporations remained difficult to locate, a problem which was not alleviated by long-arm jurisdiction, and the institution of long-arm jurisdiction in New Jersey did not make service on an unrepre-

See also, Duke Power Co. v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978) (federal statute imposing limitation on liability for federally licensed private nuclear power plant was constitutional where its purpose was to encourage private participation in developing nuclear energy).

In examining economic legislation, this Court has generally upheld such legislation where the Court found that the legislation was rationally related to a legitimate state purpose. *See, e.g., Exxon Corp.* v. *Eagerton, supra* (state statute increasing tax on gas and oil, excepting royalty owners from increase, and prohibiting producers from passing on increase to purchasers was not unconstitutional because it was rationally related to goal of protecting consumers and encouraging investment).

Furthermore, the U.S. Supreme Court has also examined and upheld social welfare legislation under the rational basis test. *See, e.g., Bowen* v. *Gilliard*, __ U.S. __, 107 S.Ct. 3008 (1987) (requirement that family wishing to receive welfare benefits include within its family unit child for whom child support payments are being made by noncustodial parent does not violate equal protection principles); *Lehr* v. *Robertson*, 463 U.S. 248 (1983) (state's failure to give putative father of illegitimate child notice of pending adoption proceedings, despite knowledge of his whereabouts, did not deny putative father equal protection); *Clements* v. *Fashing, supra* (state constitutional provisions regulating circumstances in which judges and other state employees could run for public office did not violate equal protection clause).[4]

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sented foreign corporation the equivalent of service upon a corporation with a New Jersey representative. Therefore, there were additional burdens a plaintiff was required to bear when he sued a foreign corporation lacking a New Jersey representative which he was not required to bear if the defendant were a domestic corporation or a foreign corporation with a New Jersey representative. Consequently, because of these additional burdens on the plaintiff, the U.S. Supreme Court held that the tolling provision did not deprive an unrepresented foreign corporation of the equal protection of the laws. *See G. D. Searle & Co.* v. *Cohn*, 455 U.S. at 410-412.

[4] This Court has refused to apply a "heightened" standard of review, rather than the rational basis test, to social welfare legislation. *See, e.g., Bowen*

Finally, in those cases where this Court has invalidated state provisions under the rational basis test, it has done so because the challenged statute did not further any state interest or because there was no rational basis for the statute in the record. Thus, in *City of Cleburne, Texas* v. *Cleburne Living Center*, 473 U.S. 432 (1985), this Court found that a zoning ordinance which excluded group homes for the mentally retarded violated the equal protection clause where the record did not reveal *any* rational basis for the exclusion and where the challenged classification rested on irrational prejudice. *See also Plyler* v. *Doe*, 457 U.S. 202 (1982) (Texas statute which withheld from school districts state funds for education of children who were not "legally admitted" into United States and which authorized school districts to deny enrollment to such children denied such children equal protection because statute did not further any substantial state goal).

In the instant case, Sert Jackson contends that the Massachusetts Supreme Judicial Court properly found that the applicable standard of review was the rational basis test. Furthermore, Sert Jackson contends that the Court properly applied the rational basis test in determining that M.G.L. c. 260, §2B was constitutional because the Court identified several legitimate state goals and determined that the statute was rationally related to the achievement of those goals. Consequently, there is no need for this Court to review the decision.

In its decision in the instant case, the Massachusetts Supreme Judicial Court relied on its decision in *Klein* v. *Catalano*, 386 Mass. 701, 437 N.E.2d 514 (1982), in which it had held that M.G.L. c. 260, §2B did not violate the equal protection clause. *See Dighton* v. *Federal Pacific Electric Co.*,

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v. *Gilliard*, *supra* (no merit to argument that "heightened scrutiny" must be applied because amendment affects family's right to live in type of family unit it chooses) and *Clements* v. *Fashing*, *supra* (not all ballot access questions require "heightened" equal protection scrutiny).

399 Mass. at 693, 506 N.E.2d at 514. In *Klein* v. *Catalano*, *supra*, the Supreme Judicial Court examined a number of constitutional challenges to M.G.L. c. 260, §2B, including an equal protection challenge identical to that raised by Federal Pacific, and found the statute constitutional in all respects. With respect to the equal protection challenge, the Court found that the statute of repose was constitutional because it was rationally related to a legitimate state goal.

In *Klein*, the Supreme Judicial Court held that the statute of repose did not violate the equal protection clause, even though the protection of the statute was applicable to persons involved in design and construction, but not to suppliers or owners and tenants. Initially, the Court identified the legislative purpose behind the enactment of a statute of repose.

> General Laws c. 260, §2B was enacted in response to case law abolishing the rule that once an architect or builder had completed his work and it had been accepted by the owner, absent privity with the owner, there was no liability as a matter of law.... These cases greatly increased the liability of architects, contractors, and others involved in the construction industry. "The architect or contractor was confronted not only with an unlimited class of potential claimants, but also, in many instances, with an extension in duration of the liability for negligence."...An injury could occur many years after the architect or contractor had completed his work. Since an ordinary statute of limitations did not begin to run until either the date of the injury or its discovery, those involved in construction were subject to possible liability throughout their professional lives and into retirement. At the urging of those involved in the construction industry, the legislature placed an absolute outer limit on the duration of this liability.

386 Mass. at 708-709, 437 N.E.2d at 519-520 (footnote and citations omitted).

The Court also noted that limiting the duration of liability is a well-recognized public purpose and that "[t]here comes a time when a defendant ought to be secure in his reasonable expectation that the slate has been wiped clean and that he ought not to be called on to resist" a stale claim. 386 Mass. at 709, 437 N.E.2d at 520 (citations omitted).

After identifying the public purpose behind the statute of repose, the Court then examined whether the statute's classifications were reasonably related to its purpose and whether the statute created an unreasonable or arbitrary scheme which resulted in disparate treatment for similarly situated individuals. With regard to suppliers and materialmen, the Court held that it was permissible to provide the protection of the statute to architects but not suppliers.

> The Legislature could also have reasonably concluded that it is appropriate to place separate time limits on the liability of builders and suppliers, because they work under dissimilar conditions. "Suppliers and manufacturers who typically supply and produce components in large quantities, make standard goods and develop standard processes. They can thus maintain high quality control standards in the controlled environment of the factory. On the other hand, the architect or contractor can pretest and standardize construction designs and plans only in a limited fashion. In addition, the inspection, supervision, and observation of construction by architects and contractors involves individual expertise not susceptible to the quality control standards of the factory."

386 Mass. at 716, 437 N.E.2d at 524 (citations omitted).

The Supreme Judicial Court also noted that limiting the liability of architects and design professionals only was necessary to encourage these professionals to experiment with new designs and materials. Design creativity might be stifled if architects and engineers feared that untried configurations might lead to liability decades later. 386 Mass. at 717, 437 N.E.2d at 524.

Finally, with regard to owners and tenants, the Court found that there was a valid distinction between architects and persons in possession or control, such as owners or tenants. Once the architect or contractor completes construction and relinquishes control, the architect or contractor cannot guard against neglect, abuse, poor maintenance, mishandling, improper modification or unskilled repair of the improvement to real property which might give rise to liability. 386 Mass. at 715-716, 437 N.E.2d at 524. *See also Cournoyer* v. *Massachusetts Bay Transportation Authority*, 744 F.2d 208 (1st Cir. 1984) (upholding M.G.L. c. 260, §2B against challenge under equal protection clause).

In the instant case, plainly the appropriate standard of review is the rational basis test, rather than strict scrutiny or even a "heightened" scrutiny. *See, e.g., G. D. Searle & Co.* v. *Cohn*, *supra*. Indeed, in its petition, Federal Pacific does not contend that M.G.L. c. 260, §2B should be examined under a more stringent standard. Furthermore, in the *Klein* decision, which the Massachusetts court declined to reconsider in *Dighton*, the Massachusetts Supreme Judicial Court properly identified the legitimate state purposes supporting M.G.L. c. 260, §2B and also properly found that the statute was rationally related to the achievement of these goals.

In its petition, Federal Pacific contends that denying it the protection of M.G.L c. 260, §2B constitutes an equal protection violation because Federal Pacific, as a supplier, faces a potentially unlimited period of liability and because Federal Pacific has no right to enter, inspect or otherwise control the improvement to real property in order to guard against neglect, poor maintenance or improper use of Federal Pacific's product. (Petition, pp. 8-12) While these reasons might be sufficient grounds to persuade the legislature to extend the protection of the statute to suppliers, they are not sufficient to justify a finding that the distinction between architects and suppliers is so arbitrary as to constitute a violation of equal protection.

More importantly, Federal Pacific completely fails to address the reasons articulated in *Klein* and other cases, and adopted in *Dighton*, for distinguishing between architects and suppliers. Manufacturers and suppliers who produce components in large quantities make standardized goods. They can pretest their products and maintain high quality control standards in the controlled environment of the factory. Architects, however, can pretest and standardize construction designs in only a limited fashion. In addition, services performed by architects require individual expertise not susceptible to quality control standards of the factory. Moreover, architects have more stringent licensing, educational, and professional standards. Finally, a limit on an architect's liability encourages design creativity and experimentation.

The reasons discussed above clearly justify different treatment under the statute of repose for manufacturers or suppliers like Federal Pacific and architects like Sert Jackson. Federal Pacific has failed to demonstrate that the statute does not further any legitimate state interest or that no rational basis exists to support the statute. No fundamental right or suspect classification is involved. Therefore, where the reasons for providing the protection of the statute to architects but not to suppliers are rationally related to the legitimate public purpose of limiting the duration of liability in certain circumstances, the statute is plainly constitututional. Consequently, this Court should deny Federal Pacific's petition for a writ of certiorari.

II. Federal Pacific Has Not Sufficiently Demonstrated a Conflict Between Decisions of Highest State Courts Concerning a Federal Question.

In its petition, Federal Pacific argues that this Court should grant Federal Pacific's petition for a writ of certiorari because a conflict exists among various jurisdictions concerning the constitutionality of state statutes of repose. However, Sert Jackson

contends that Federal Pacific has not sufficiently demonstrated such a conflict because only one case cited by Federal Pacific invalidates the statute of repose exclusively on federal equal protection grounds.

Courts in a number of other states have examined equal protection challenges to their statutes of repose and found them to be constitutional. *See generally Carter* v. *Hartenstein*, 248 Ark. 1172, 455 S.W.2d 918 (1970), *appeal dismissed*, 401 U.S. 901 (1971); *Salinero* v. *Pon*, 124 Cal. App. 3d 120, 177 Cal. Rptr. 204 (1981); *Cudahy Co.* v. *Ragnar Benson, Inc.*, 514 F. Supp. 1212 (D. Colo. 1981) (applying Colorado law); *Cheswold Volunteer Fire Co.* v. *Lambertson Construction Co.*, 489 A.2d 413 (Del. 1984); *Britt* v. *Schindler Elevator Corp.*, 637 F. Supp. 734 (D.D.C. 1986) (applying District of Columbia law); *Mullis* v. *Southern Company Services, Inc.*, 250 Ga. 90, 296 S.E.2d 579 (1982); *Twin Falls Clinic & Hospital Building Corp.* v. *Hamill*, 103 Idaho 19, 644 P.2d 341 (1982); *Beecher* v. *White*, 477 N.E.2d 622 (Ind. App. 1983); *Burmaster* v. *Gravity Drainage District No. 2*, 366 So.2d 1381 (La. 1978); *Whiting-Turner Contracting Co.* v. *Coupard*, 304 Md. 340, 499 A.2d 178 (1985); *O'Brien* v. *Hazelet & Erdal*, 410 Mich. 1, 299 N.W.2d 336 (1980); *Reeves* v. *Ille Electric Co.*, 170 Mont. 104, 551 P.2d 647 (1976); *Howell* v. *Burk*, 90 N.M. 688, 568 P.2d 214 (App. 1977), *cert. den.*, 91 N.M. 3, 569 P.2d 413 (1977); *Lamb* v. *Wedgewood South Corp.*, 308 N.C. 419, 302 S.E.2d 868 (1983); *Elizabeth Gamble Deaconess Home Assn.* v. *Turner Construction Co.*, 14 Ohio App. 3d 281, 470 N.E.2d 950 (1984); *Van Den Hul* v. *Baltic Farmers Elevator Co.*, 716 F.2d 504 (8th Cir. 1983) (applying South Dakota law); *Harmon* v. *Angus R. Jessup Associates, Inc.*, 619 S.W.2d 522 (Tenn. 1981); *Sowders* v. *M. W. Kellogg Co.*, 663 S.W.2d 644 (Tex. App. 1983, writ ref'd n.r.e.).

In addition to the reasons articulated in *Klein*, several states have relied on additional reasons for permitting distinctions between architects and suppliers. For example, in *Beecher* v.

White, *supra*, an Indiana court found it was permissible to treat architect and design professionals differently because design professionals are subject to licensing, educational and professional standards which provide some measure of protection to the public. *See also*, *O'Brien* v. *Hazelet & Erdal*, *supra*.

In its petition, Federal Pacific states that nine jurisdictions have found statutes of repose for architects and design professionals to be unconstitutional.[5] (*See* petition, p. 10) However, in three of the cases cited by the petitioner in which a statute of repose was found to be unconstitutional, the state courts did not explicitly rely on federal equal protection grounds in order to invalidate the statute. *See Pacific Indemnity Co.* v. *Thompson-Yaeger, Inc.*, 260 N.W.2d 548 (Minn. 1977) (statute unconstitutional because it grants a special immunity without a rational basis); *Plant* v. *R. L. Reid, Inc.*, 294 Ala. 155, 313 So.2d 518 (Ala. 1975) (statute void for vagueness, indefiniteness, and uncertainty); and *Skinner* v. *Anderson*, 38 Ill.2d 455, 231 N.E.2d 588 (1976) (statute violates state constitutional provision that legislature shall not grant special immunity).

In addition, in five cases, the state courts relied on both federal and state grounds to invalidate the statutes. *See McClanahan* v. *American Gilsonite Co.*, 494 F. Supp. 1334 (D. Colo. 1980) (violation of federal equal protection clause and state constitutional provision prohibiting laws granting special immunity); *Shibuya* v. *Architects Hawaii, Ltd.*, 65 Hawaii 26, 647 P.2d 276 (1982) (decision rested on state equal protection provision, with guidance from decisions of U.S. Supreme Court); *Henderson Clay Products, Inc.* v. *Edgar Wood & Associates, Inc.*, 122 N.H. 800, 451 A.2d 174 (1982) (violation of federal and state equal protection provisions); *Fujioka* v. *Kam*, 55 Hawaii 7, 514 P.2d 568 (1973) (violation of federal and state equal protection provisions); *Broome* v.

[5] Federal Pacific actually cites ten jurisdictions where the statute of repose was found to be invalid.

Truluck, 270 S.C. 227, 241 S.E.2d 739 (1978) (violation of state and federal equal protection provisions). In only one case cited by Federal Pacific was the finding of a violation of the federal equal protection clause the sole ground for invalidating the statute. *See Loyal Order of Moose, Lodge 1785* v. *Cavaness*, 563 P.2d 143 (Okla. 1977).[6]

In the instant case, Federal Pacific argues that this Court should grant a writ of certiorari because there is a conflict between jurisdictions on this issue. (Petition, p. 10) However, Sert Jackson contends that the conflict is illusory where essentially all but one of the cases cited by Federal Pacific rely either exclusively on state grounds or jointly on federal and adequate and independent state grounds and only one relies exclusively on federal grounds.[7] Consequently, Federal Pacific has not sufficiently demonstrated a conflict on the basis of a federal question, and under these circumstances, this Court should not grant the petition for certiorari.

The majority of jurisdictions have found such statutes to be constitutional. *See* Heller, *The District of Columbia's Architects' and Builders' Statute of Repose: Its Application and Need for Amendment*, 34 Cath. U. L. Rev. 919, 968 (1985) Furthermore, the U.S. Supreme Court has previously dismissed an appeal for want of a substantial federal question, where the state court decision upheld a statute of repose against, *inter alia*, a federal equal protection challenge. *See Carter* v. *Hartenstein*, *supra*.

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[6] In one case cited by Federal Pacific, the state court simply noted that the trial court had invalidated the statute on equal protection grounds and that this holding was not challenged on appeal. The decision thus contained no analysis of the finding of an equal protection violation, nor did it indicate whether state or federal equal protection provisions were the basis of the decision. *See Hartford Fire Ins. Co.* v. *Osborn Plumbing & Heating, Inc.*, 66 Wis.2d 454, 225 N.W.2d 628 (1975).

[7] Where adequate and independent state grounds support a state court judgment, the U.S. Supreme Court is deprived of jurisdiction to review the state court judgment. *See Michigan* v. *Long*, 463 U.S. 1032 (1983) and *Zacchini* v. *Scripp-Howard Broadcasting Co.*, 433 U.S. 562 (1977).

Where Federal Pacific has not sufficiently demonstrated that a conflict exists among state court decisions concerning a federal question, this Court should not grant a petition for a writ of certiorari.

Conclusion

For the reasons discussed above, respondent Sert, Jackson and Associates, Inc. respectfully requests that this Court deny the petition for a writ of certiorari.

Respectfully submitted,

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